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No.

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In the Supreme Court of the United States

October Term, 1980

BLUE GRASS PROVISION CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, as this Court will decide this term in *First National Maintenance Corporation v. National Labor Relations Board,* No. 80-594, an employer's decision to terminate a portion of its operations solely for legitimate business reasons is itself a mandatory subject of bargaining under Section 8(a)(5) of the Act?

2. Whether, if there is a duty to bargain concerning an employer's decision to terminate a portion of its operations solely for legitimate business reasons and the employer has engaged in good faith bargaining, the employer must reach impasse with the union before implementing the decision?

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BLUE GRASS PROVISION CO., INC.,
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Blue Grass Provision Co., Inc.,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit enforcing an order of the National Labor Relations Board.

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1. In accordance with Supreme Court Rule 28.1, the petitioner states that it has no parent, subsidiary, or affiliated companies.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A at A1)[2] is reported unofficially at 105 LRRM 3487. The opinion and order of the National Labor Relations Board (App. A at A8) are reported at 238 NLRB No. 128 (1978).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit enforcing the Board's order was entered on December 9, 1980. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 USC §1254(1). The jurisdiction of the Court of Appeals was invoked under Section 10(f) of the National Labor Relations Act, as amended, 29 USC §160(f).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are Sections 8(a)(1), 8(a)(3), 8(a)(5) and 8(d). They are set forth in Appendix B.

STATEMENT OF THE CASE

The petitioner is a small meat processor with a long history of peaceful relationships with the two labor organizations representing its employees.

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2. "App. A" and "App. B" refer to the appendices to this petition for certiorari. Appendix A contains the judgment and opinions of the court below and the decisions and orders of the National Labor Relations Board and the Administrative Law Judge. Appendix B contains the relevant provisions of the National Labor Relations Act.

On November 12, 1976, petitioner was notified by the Teamsters local union representing its five delivery drivers, that the union was cancelling its collective bargaining agreement effective with its expiration on January 31, 1977. The parties subsequently agreed to extend the agreement until February 11, 1977.

Prior to any meeting with the union, the petitioner had investigated alternative methods of delivery in order to lessen costs and increase its flexibility. During the course of two meetings conducted in late January of 1977, petitioner's negotiator and president, Bill Rice, notified the union that petitioner wanted to switch to a common carrier for its deliveries and suggested that petitioner would be willing to phase out the employees as they retired over the next four years. The union agent refused to negotiate an agreement which would eliminate the bargaining unit through attrition and instead proposed an absolute bar on subcontracting of unit work. The second and final meeting between the parties was held on January 28, 1977.

The union requested no negotiations at any time after January 28, 1977. Rather, on the evening of January 31, 1977, the union agent met with the petitioner's delivery drivers. He informed the drivers about his subcontracting discussion with petitioner. He stated that he could not negotiate a contract that would provide for subcontracting away bargaining unit work. The employees then voted to strike.

Petitioner's president, having received no contact from the union, telephoned the union's agent on the morning of February 7. In that telephone call, he told the union agent of the company's continued interest in going to a common carrier. The union agent informed petitioner's president that he would do everything in his power to prevent petitioner from going to a common carrier.

On the following day, February 8, petitioner's president sent a letter to the union's agent stating that he was still interested in talking with the union and asked the agent to contact him if they could meet. Nothing further was heard from the union prior to the expiration of the extension on February 11.

After the telephone conversation with the union on February 7, the three Rice brothers, principals in petitioner, faced with the union's adamant position on discontinuing deliveries, met and reached agreement with a common carrier to take over the petitioner's delivery operations the following Monday, February 14, if no agreement was reached with the union prior to the expiration of the extension February 11. This was done in order to insure delivery of the company's perishable meat. The Rice brothers assumed that there would be some response from the union in light of the impending expiration of the agreement and President Bill Rice's February 8 letter.

Having heard nothing from the union by the end of the work day Friday, February 11, President Rice notified the drivers that petitioner would be using an outside carrier and that they need not report to work the following Monday. The union struck petitioner without further notice or discussion and picketing continued up to the time of the hearing before the administrative law judge, December 14, 1977.

The petitioner immediately approached the Federal Mediation and Conciliation Service requesting that a meeting be scheduled to resolve the dispute. The union refused this unconditional offer to meet and no meetings were held up to the date of the hearing before the administrative law judge.

The National Labor Relations Board held that the petitioner had violated Sections 8(a)(1) and (5) of the Act "by

unilaterally subcontracting out all of its truck driving work effective February 14, 1977." (App. A at A23) The Board found that the parties were not at "impasse" over the petitioner's proposal to phase out deliveries. The Board scored petitioner's failure to communicate its immediate discontinuance of its delivery operations "with any definite particularities." (App. A at A23) It noted that the petitioner's letter of February 8 requesting further meetings was "inconsistent with the notion that matters were deadlocked." Applying its *per se* rule that "[u]ntil the collective bargaining process has been exhausted, no impasse can occur," (App. A at A23) the Board ordered reinstitution of the delivery operation, reinstatement of the drivers and back pay. (App. A at A28-29)

The Court of Appeals for the Sixth Circuit, on review, held that petitioner "had breached its duty to bargain by instituting a unilateral change before an impasse had been reached on a subject of mandatory bargaining." (App. A at A5) The Court said it was "mindful that Blue Grass is a small company with a history of relatively peaceful labor relations and that the effect of the reinstatement order may cause it hardship." Nonetheless, it granted enforcement of the Board's order. (App. A at A7)

REASONS FOR GRANTING THE WRIT

1. The first issue presented by this case is already before the Court on substantially similar facts in *First National Maintenance Corporation v. National Labor Relations Board, October Term, 1980,* No. 80-594. This Court granted certiorari in that case, apparently to resolve the very real divergence among the circuits on this issue. The Sixth Circuit below has interpreted *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964) as automatically im-

posing a bargaining obligation on the employer, despite the substantial modification of the employer's operation which involved total cessation of product deliveries and reduction of its employee work force by about 20%. The impact on the employer's business here was proportionally greater than that in *First National Maintenance Corp., supra.* The Sixth Circuit's *per se* approach here is at clear variance with the "presumption" approach utilized by the Second Circuit in that case as well as the approaches of the Fourth, Eighth and Tenth Circuits discussed in detail in the petition filed in that case.[3] It is also diametrically opposed to the decision of the Eighth Circuit in *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966), holding that discontinuance of an employer's delivery operations for economic reasons did not require bargaining. The only practical way of preserving this petitioner's legal rights, pending this Court's decision in *First National Maintenance Corp.*, is by granting the Writ.

2. This case also presents a second, closely related, and, if anything, even more significant legal issue. If, as here, an employer contemplates legitimate major business action—what is the scope of any bargaining which attaches? This issue is not directly presented by *First National Maintenance Corp., supra.* The employer there undertook no bargaining whatsoever regarding its decision to change its business operation. The instant case, however, presents the full range of issues raised by the Board's

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3. *See Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976); *NLRB v. William J. Burns International Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965); *NLRB v. Edward M. Rude Carrier Corp.*, 79 CCH Lab. Cas. ¶11,615 (4th Cir. 1976); *NLRB v. Thompson Transport Co.*, 406 F.2d 698 (10th Cir. 1969). Compare: *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978).

intrusive approach to the process of implementing managerial judgments.

Whether and upon what standard Congress has delegated to the NLRB and the courts the power to regulate the timing or the manner in which an employer takes action solely in order to further legitimate business objectives is an issue of paramount importance to National Labor policy. It will be raised and discussed by this Court in addressing the management rights issues in *First National Maintenance Corp.* It will substantially advance coherent presentation and decision to have a record presenting the entire subject directly.

3. The incorrect decisions rendered in this case below graphically illustrate the problem raised by the scope of bargaining issue. The Court of Appeals and Board have here held that an employer may not take action to further its legitimate business objectives until it has reached impasse with the union on that specific action. The Court of Appeals candidly acknowledged that the "state of affairs that constitutes an impasse is not subject to precise definition." (App. A at A5) It noted equally candidly that the District of Columbia Circuit in *Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969), *affirming sub nom., Darling & Co.*, 171 NLRB 801 (1968), had taken a different view of the impasse requirement. The Court of Appeals, however, went on to distinguish the *Lane* case based upon its own analysis of the length of negotiations, the depth of the parties' feelings, the number of concessions the company had made in negotiations and the company's concern with the timing of a possible strike. (App. A at A6-7)

These simply are not matters mandated by Congress for interpretation by the Board or the Courts of Appeals in second-guessing the timing of employer business ac-

tions. Neither the Board nor the courts have been empowered by Congress to determine *when*, in the exercise of its managerial discretion, an employer may take legitimate actions in furtherance of its business interest which may indirectly or directly affect some or all of the conditions of employment of its employees. The practical impossibility of fairly and correctly applying the Board's impasse rule is apparent when the "rule" itself is seen as it is—nothing more than the Board's imprecise weighing of an amalgam of factors. For example, in *Taft Broadcasting Co., WDAF AM-FM-TV*, 163 NLRB 475, 478 (1967) the Board stated:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

No business person or lawyer, can with confidence predict the outcome of the Board's review of a decision involving such factors. The Board's review, of course, is pure hindsight, made long after the decision has been implemented, the effects of the decision realized, and potential back pay liability is accrued. *See generally*, Epstein, *Impasse in Collective Bargaining*, 44 Texas L. Rev. 769, 777 (1966); Stewart and Engeman, *Impasse, Collective Bargaining, and Action*, 39 U. Cin. L. Rev. 233, 240-248 (1970). As a result, through the control of its impasse doctrine, the Board has been able to hold hostage through extended negotiations, or reverse, such traditional managerial decisions as a radio station's decision to change its method of broadcasting, a manufacturer's decision to close a sales branch, and a trucking company's discontinuance of

unprofitable runs.[4] It is hard to say that a "far heavier hand in controlling . . . the prerogatives of private business management" is not already being wielded, despite Mr. Justice Stewart's warning in *Fibreboard Paper Products, supra,* that this is a path "which Congress certainly did not choose when it enacted the Taft-Hartley Act". 379 U.S. 203 at 225-26. (Stewart, J., concurring).

The Court of Appeals for the Fifth Circuit fully recognizes the plight to which a *per se* impasse rule would put employers. In *Houston Shopping News Co. v. NLRB,* 554 F.2d 739 (5th Cir. 1977), that court found that the absence of a bargaining impasse was *not* a bar to employer action taken solely to further its legitimate business objectives. *See also NLRB v. J. P. Stevens & Co., Inc., Gulistan Div.,* 538 F.2d 1152, 1162 (5th Cir. 1976); *A. H. Belo Corp.,* 411 F.2d 959, 971 (5th Cir. 1969), *cert. denied,* 396 U.S. 1007 (1970). The Fifth Circuit has recognized: "The union has no absolute veto power under the Act. Nor do negotiations have to exhaust themselves to the point of the so-called impasse." *NLRB v. Citizens Hotel Co.,* 326 F.2d 501, 505 (5th Cir. 1964). Compare: *Winn-Dixie Stores, Inc.,* 243 NLRB No. 151 (1979) (in which the Board has criticized the Fifth Circuit's view).

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4. See *Taft Broadcasting Co., WDAF AM-FM-TV,* 163 NLRB 475 (1967), *affirmed sub nom., American Federation of Television & Radio Artists v. NLRB,* 395 F.2d 622 (D.C. Cir. 1968) holding an employer could implement changes in pre-recording and interchange of announcer policies after 27 meetings with the union had produced an impasse. The Court of Appeals affirmed, specifically reserving the question of whether impasse was required, 395 F.2d at 629; *Brockway Motor Trucks, Div. of Mack Trucks, Inc.,* 251 NLRB No. 23 (1980) on remand from *Brockway Motor Trucks v. NLRB, supra,* 582 F.2d 720 (3d Cir. 1978) holding an employer had no need for "immediate action" in closing a facility after sustaining seven years of losses totalling over $1,400,000.00, two months of unsuccessful wage negotiations and a two month strike; *N. C. Coastal Motor Lines, Inc.,* 219 NLRB 1009, 1014 (1975), enforced on other grounds, 542 F.2d 637 (4th Cir. 1976).

Clearly, a very real split exists among the circuit Courts of Appeals on this issue. Although this Court has never suggested that Congress intended so radical a regulation of business decisions to be the province of the National Labor Relations Board and the courts, its decisions are being cited by the Board and some courts as if it had.

4. Both lines of authority discussed above stem from the decision of this Court in *NLRB v. Katz,* 369 U.S. 736 (1962). The Court there held that an employer's unilateral implementation of several wage and benefit changes, during collective bargaining negotiations over the very subjects of wage and benefit increases, violated Sections 8(a)(5) and (1) of the Act. The Court's opinion speaks of an obligation to first give notice and an opportunity to bargain to the statutory bargaining representative of the employees before taking such an action. The Court expressed its concern that the unilateral nature of the action on a subject already under negotiation was much the equivalent of a "flat refusal" to bargain. 369 U.S. at 743. Of course, explicitly the Court was speaking to a situation in which the union was attempting to negotiate changes in traditional areas of its concern, i.e., wages and benefits. The attempt was obviously being undercut by the employer's unilateral action. The Court in no way considered the situation in which the employer was attempting to implement a legitimate economic change in its business operation and the union was opposed to the change.

This Court has never suggested that the timing of such legitimate action is subject to Board or judicial review or approval. On the contrary, in *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965), this Court rather broadly suggested that it was not. In that case, the Court struck down the Board's attempt to regulate employer lockouts by expansive reading of Sections 8(a)(1) and (3) of the

Act. The Board had issued a Section 8(a)(5) complaint as well but made no findings regarding that allegation. However, this Court specifically addressed the Section 8(a)(5) point:

> Although the complaint stated a violation of §8(a)(5) as well, the Board made no findings as to this claim, believing that there would have been no point in entering a bargaining order because the parties had long since executed an agreement. The passage quoted below in the text of this opinion from *Labor Board v. Insurance Agents' International Union*, 361 U.S. 477, has even more direct application to the §8(a)(5) question. See also, *Labor Board v. Dalton Brick & Tile Corp.*, 301 F.2d 886, 894-895 (C.A. 5th Cir. 1962). 380 U.S. at 306 n. 5.

The meaning of this reference is clear from reading the passage from *Insurance Agents'* referred to:

> '[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into . . . the Act. . . . We have expressed our belief that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.' *Labor Board v. Insurance Agents' International Union*, 361 U.S. 477, 497-498. 380 U.S. at 317-318.

The Court's reference to *NLRB v. Dalton Brick & Tile Corp.* is similarly instructive. In that case the Second Circuit was faced with an explicit finding that a lockout

during negotiations amounted to a refusal to bargain in violation of Section 8(a)(5). The court stated:

> Our approach is to match the employer's conduct under review against specific provisions of the Act to see whether, within the accepted limits of judicial review [Footnote], there is substantial evidence of actions which constitute violations of standards prescribed by Congress. We stress the latter because several recent decisions emphasize the necessity that a statutory basis, either expressed or reasonably implied, be found when the Board undertakes to fashion policies which, in its judgment, are desirable in balancing the conflicting interests between management and labor. . . .
>
> When this is done in this record, we find no basis for the Board's conclusion that the lockout as a weapon to aid the Employer in the bargaining constituted a §8(a)(5) failure to bargain in good faith. . . . 301 F.2d at 894-895.

The Court of Appeals continued:

> So long as the parties seriously and earnestly go forward in a genuine desire to work out a final settlement of their controversies, they have complied with that mandate of the Act. The Insurance Agents' case makes clear that it is not for the Board to balance the scales, equalize or neutralize pressures under the guise of a lack of good faith attributed to the party resorting to forces of a kind the Board thinks undesirable. Indeed, we consider that case far-reaching by its concentrated focus on the immediate process of bargaining. The decision—if it does not impliedly do so completely—comes close to holding what the concurring opinion makes explicit, *that it is inaccurate to regard any given action as a per se refusal to bargain.* More than that,

> the decision frankly recognizes that the objective—the collective bargaining agreement—is by the very nature of things an annealing process hammered out under the most severe and competing forces and counteracting pressures. *Unless Congress has proscribed a given pressure, or unless its exertion or the manner of its exercise collides with some other specific policy of the Act, its use may not be transmuted to make what is in fact good faith at the bargaining table into something else.* 301 F.2d at 895. (Emphasis added)

See also H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

Here, the Board has taken its impasse principle, developed to determine when parties may break off good faith negotiations[5] and to regulate when a party may no longer seek negotiations on non-mandatory bargaining subjects[6] and re-generated impasse as a device to regulate the timing of all legitimate employer actions.

The Board has never found that petitioner did not act in good faith. It has never found that petitioner was motivated unlawfully or was violating Sections 8(a)(1) or (3) of the Act. The Board here expressly refused to find that petitioner violated Section 8(d). (App. A at A9) By simply declaring that petitioner's action was mistimed because no impasse had been reached and was thereby a refusal to bargain in good faith, the Board has done exactly what this Court repeatedly warned it against in *American Ship Building, supra,* and *Insurance Agents', supra.* Matching the "employer's conduct against specific provisions of the Act" it is obvious that the Board's action has no basis. *NLRB v. Dalton Brick & Tile Corp., supra.*

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5. *See Philip Carey Mfg. Co.*, 140 NLRB 1103 (1963), *modified*, 331 F.2d 200 (6th Cir. 1964).

6. *See NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

Applying the Board's nebulous impasse standard to the facts of the present case demonstrates its unworkability. In the Board's scenario, the petitioner's president apparently was supposed to call on Friday, February 11 to see if a deal could not be worked out with the Teamsters' agent for the immediate replacement of the petitioner's drivers on the following Monday. This was the same agent who had told him on Tuesday that he would do everything in his power to stop petitioner's going to a carrier. For more than two weeks the union had adamantly refused to consider the replacement of those drivers over four years. They had not contacted him. They had voted to strike. Now they would reasonably request discussion on this issue because the Company called again? This scenario is between tragedy and comedy. No layman, other than a comic writer, could suggest such an approach. No serious business person would consider it—certainly not in the circumstances of a contract expiration and threatened strike.

The Court of Appeals, while struggling with the very real question of what petitioner was to do when its contract expired, its no-strike clause protection evaporated and its perishable meat products had to be shipped on the next Monday, added its own practical advice for petitioner. It simply announced petitioner "certainly could have taken steps to have a common carrier act as a replacement if the union drivers went on strike at the expiration of the contract." (App. A at A7) The Court of Appeals apparently believed that refrigerated trucks—with drivers—can be called up to deliver thousands of pounds of meat over three states in much the same way you call a taxi cab. Archibald Cox wrote with great perception over twenty years ago:

> The administrative and judicial processes are ill-suited to drawing a line between proper subjects for collective bargaining and management functions. The NLRB is staffed chiefly by lawyers who lack practical experience in industrial management and collective bargaining, and judges are not familiar with the problems. Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1083 (1958).

5. Engraftment of the Board's impasse rules on the implementation process is fraught with danger for the national economy. As the Chamber of Commerce for the United States noted in its amicus brief in support of the petition in *First National Maintenance Corp., supra*:

> A vital national economy requires a maximally free flow and effective use of its economic resources. . . . The need is especially acute in our time, when we are experiencing sharp declines either in the rate of increased productivity or, more alarmingly, in absolute productivity figures. Brief Amicus Curiae in Support of Petition, p. 4.

This Court can do a great service by accepting the opportunity presented here to address this matter.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

No. 78-1483

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BLUE GRASS PROVISION CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review and Cross-Petition for Enforcement of an Oruer of the National Labor Relations Board.

Decided and Filed December 9, 1980.

Before: LIVELY and KEITH, Circuit Judges, and LAMBROS, District Judge.*

LAMBROS, District Judge. Blue Grass Provision Co., Inc. asks us to set aside a decision and order of the National Labor Relations Board that found Blue Grass had refused to bargain collectively in good faith with Truckdrivers, Chauffeurs and Helpers Local No. 100 regarding the company's decision to subcontract the delivery of its meat products. The Board's decision was accompanied by an order directing Blue Grass to reinstate its delivery operations

*Honorable Thomas D. Lambros, District Judge, United States District Court, for the Northern District of Ohio, sitting by designation.

and the delivery employees with back pay. The Board on cross-petition seeks enforcement of this order.

This case was commenced upon the filing of a complaint by the Board on August 10, 1977 alleging that "[s]ince on or about January 25, 1977, [Blue Grass Provision Co., Inc.] has failed and refused, and continues to refuse, to bargain collectively in good faith with the Union . . . by: (a) failing to negotiate with the Union with respect to its decision to permanently and immediately subcontract out all unit work performed by [the employees of Local 100] . . . and (c) [u]nilaterally subcontracting out all unit work performed by [those] employees . . . and discharging all employees of said unit" in violation of sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* The case was heard by an Administrative Law Judge (ALJ) who found that the company had terminated the contract in violation of § 8(a)(1) and (5), and ordered the remedies previously mentioned. The Board affirmed. Petitioner now asserts that these findings are against the weight of the evidence and contrary to the interpretation of the National Labor Relations Act given by current decisions in this and in other Circuits.

At the time the dispute arose Blue Grass, a small family-owned company, had employed members of the union for about 20 years to make deliveries and was operating under a contract which was to expire on January 31, 1977. Concerned with rising costs, in early January company president William Rice began to explore the feasibility of subcontracting the delivery operations. At about the same time he contacted Local 100 Business Agent Fred Batsche to ask when they could meet to discuss a new contract. Batsche asked that they delay negotiations until the major packers had signed their contracts at which time union demands would be in clearer focus.

The two men finally met on either January 24 or 25, at which time the parties agreed to an eleven day extension of the contract. Batsche presented Rice with the proposals prepared by the union for presentation to all the area meat packers which contained, *inter alia,* a clause providing that no work presently performed by union members would be subcontracted. Batsche testified before the ALJ that Rice complained about the overall cost of the package but gave no indication that the subcontracting clause was particularly troublesome. Rice claimed, however, that he told Batsche that Blue Grass "wanted to get out of the trucking business." This meeting was admittedly inconclusive, with Rice wanting time to consider the proposals. The two met again on January 28, and Rice mentioned that he desired to negotiate a contract that would protect his employees so that they could retire through attrition and that he would refuse to negotiate if such a clause was not included. According to Batsche, this was the first indication the union had that Blue Grass was considering a change in its delivery operations.

On February 7, Rice called Batsche on the advice of counsel in order to make sure that the union understood the company wanted to terminate their trucking operations. According to Batsche, however, the discussion centered again on gradually phasing out the unit with Batsche strongly opposed. The conversation ended with Rice affirming that he was unwilling to negotiate further. Following this interchange, Rice realized that he had spoken too hastily, and sent a letter to Batsche the following day indicating that Blue Grass was still willing to pursue negotiations. This letter was not seen by Batsche until February 12.

With no extension sought by either side and the contract set to expire on February 11, Rice made plans to have

a common carrier make his meat deliveries starting on Monday, February 14, contingent on the failure to reach an agreement with the union. Having heard nothing further from the union, on February 11 Rice informed his five drivers that they were laid off and that their work would be performed henceforth by a subcontractor. The laid-off drivers started picketing on February 15.

At the administrative hearing, Blue Grass argued that an impasse had been reached and that the union had waived its bargaining rights by refusing to consider the company's desire to subcontract. The union asserted that Blue Grass had breached its obligation not to make unilateral changes in employment conditions without first giving notice and bargaining with the statutory bargaining representative of the employers as required by *N.L.R.B. v. Katz*, 369 U.S. 736 (1962). Faced with a conflicting narrative, the ALJ gave more credence to the testimony offered by Mr. Batsche.

Our function in reviewing his ruling as adopted by the NLRB is to examine the record in order to ascertain that the Board's findings of fact are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Retail Store Employees Union, Local 876*, 570 F.2d 586 (6th Cir. 1978). Having done so, we affirm the Board and dismiss petitioner's claim.

Blue Grass does not dispute that an employer must bargain about subcontracting which involves the replacement of employees in the existing unit with those of an independent contractor to do the same work under similar conditions of employment, *see Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), but asserts that it had properly notified the union of its intentions and given it a "meaningful chance to offer counter-proposals and counter-arguments," *NLRB v. J. P. Stevens & Co., Inc.*,

Gulistan Div., 538 F.2d 1152, 1162 (5th Cir. 1976). In Blue Grass' view, the proper disposition would have been for the ALJ to dismiss because of the Union's failure to negotiate, citing for authority *The Emporium*, 221 NLRB 1211 (1975), and *Laclede Gas Co.*, 171 NLRB 1392 (1968). Those cases disclose, however, that the employer had unequivocally informed the union of an intention to subcontract work on a definite date and that the union failed to take advantage of that opportunity to negotiate. Our examination of the record before us in the instant case shows no such expression on the part of the employer. Even giving Rice's testimony full credence, we cannot say that when he left the January 24 meeting, Batsche was on notice that Blue Grass contemplated laying off all of the drivers at the expiration of their contract. It may well be that at the time Rice did not in fact plan to take such action. Unfortunately, subsequent discussions between the parties reflect that each wrongly assumed the other knew what issue was being discussed. Ideally, both gentlemen would have used greater clarity, precision and candor in their communications, but this was not the case, and the ALJ had substantial evidence before him to support a finding that Blue Grass had breached its duty to bargain by instituting a unilateral change before an impasse had been reached on a subject of mandatory bargaining.

Blue Grass replies that an impasse had been reached and that its actions in effect amounted to a legal lockout. We are not persuaded on either count. While that state of affairs that constitutes an impasse is not subject to precise definition, at least it encompasses the notion that both sides are aware of precisely what is at issue and that they have made more than a perfunctory attempt to reach a resolution. *See, e.g. Taft Broadcasting Co.*, 163

NLRB 475 (1967), *enf'd sub nom AFTRA v. NLRB,* 395 F.2d 622 (D.C. Cir. 1968). In light of a record that leaves considerable doubt whether the Union ever understood Blue Grass meant to terminate the bargaining unit upon expiration of the contract and that discloses that any meetings between the parties were at best preliminary sparring matches, we cannot say that there existed a "state of facts in which the parties, despite the best of faith, [were] simply deadlocked." *NLRB v. Tex-Tan,* 318 F.2d 472, 482 (5th Cir. 1963). This is particularly true in light of Blue Grass' own letter of February 8 evidencing its willingness to talk further with the union.

Blue Grass' assertion that the action it took would be legal had it been denominated a lockout does not alter our judgment. The Company cites *Lane v. NLRB,* 418 F.2d 1208 (D.C. Cir. 1969), *aff'ing sub nom Darling & Co.,* 171 NLRB 801 (1968), for the proposition that an employer faced with a hard negotiating position but no impasse and not an imminent strike can lockout in support of its bargaining demands. In that case Judge Skelly Wright was careful to note that

> [f]irst, employer conduct which is "inherently destructive" of employee rights is an unfair labor practice whether or not such conduct [is] based upon important business considerations. Second, employer conduct which has only a "comparatively slight" impact on the rights of employees will also be held an unfair labor practice unless the employer comes forward with evidence of "legitimate and substantial" reasons to justify his conduct.

418 F.2d at 1211. Judge Wright, however, was faced with a situation in which there had been ten negotiating sessions with the union before the lockout, the disagreement was over an issue that had been the subject of a long

strike some years earlier, the company had already made numerous concessions, and the union delayed striking until the company's peak season when 70 per cent of its annual production was to be shipped in a two-month period.

Assuming *arguendo* that Blue Grass' action was not "inherently destructive" of employee rights, it still cannot demonstrate that its business interests were so legitimate and substantial as to justify the impact that the lockout had on its employees' rights. Contrary to its assertions, Blue Grass had not made repeated attempts to get the union to recognize its plight. It was not faced with a situation that would have a devastating impact on its business and it certainly could have taken steps to have a common carrier act as a replacement if the union drivers went on strike at the expiration of the contract.

Under the circumstances, we think the Board's finding that there was a violation of Section 8(a)(1) and (5) is amply supported by the record. We are mindful that Blue Grass is a small company with a history of relatively peaceful labor relations and that the effect of the reinstatement order may cause it hardship. Nonetheless, the Board has a broad discretion in the remedies it selects to protect employees who are the victims of an unfair labor practice, *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973), and so long as it has responsibility exercised its judgment, courts will not interfere with that remedy, which is peculiarly a matter for administrative competence. *Office and Professional Emp. Intern. Union Local 425 AFL-CIO v. NLRB*, 419 F.2d 314 (D.C. Cir. 1969).

Blue Grass' petition is dismissed, the decision of the Board is affirmed, and its cross-petition for enforcement of its order is hereby granted.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9-CA-11074

BLUE GRASS PROVISION CO., INC.

and

TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 100, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On April 14, 1978, Administrative Law Judge Phil W. Saunders issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision[1] in light of the exceptions and briefs and has decided to affirm the rulings,[2] finding,[3] and conclusions[4] of

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1. We note that at two points in his discussion the Administrative Law Judge inadvertently refers to Sec. 8(d)(3) as Sec. 8(a)(3).

2. Respondent requests that the Board decide the instant case *de novo* or, in the alternative remand the proceedings to the Administrative Law Judge, on the ground that the latter failed to make independent findings of fact and conclusions of law contrary to the Board's Rules & Regulations, Series 8, as amended, Sec. 102.45. In support thereof, Respondent asserts that the Administrative Law Judge's Decision is, in large part, a verbatim copy of the General Counsel's brief to the Board.

Contrary to Respondent's contention, the Administrative Law Judge's Decision provides an independent recitation of facts, analysis, and conclusions of law, which are fully supported by the record. Therefore, we conclude that the Administrative Law Judge complied in full with applicable Board Rules in the instant case. Accordingly, we hereby deny Respondent's request for a hearing *de novo* and its alternative request for remand.

3. Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

4. We agree with the Administrative Law Judge that Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally subcontracting all of its truckdriving work, thereby eliminating the bargaining unit, without giving notice to the Union of such a change or affording it an opportunity for bargaining over the effect of that change. Accordingly, Members Jenkins and Truesdale find it unnecessary to reach the question whether Respondent further violated Sec. 8(a)(5) and (1) by failing to comply with Sec. 8(d)(3) and (4) of the Act inasmuch as the scope of the remedy is essentially identical; nor is Respondent's obligation to bargain (otherwise imposed by Sec. 8(a)(5)) with respect to changes in terms and conditions of employment affected. Therefore, the Administrative Law Judge's recommended Order is modified accordingly.

Member Murphy finds, in agreement with the Administrative Law Judge, that Respondent further violated Sec. 8(a)(5) by failing to comply with Sec. 8(d)(3) and (4) of the Act. However, she disagrees with the view expressed by her colleagues that neither the remedy provided nor the bargaining obligation which

(Continued on following page)

the Administrative Law Judge and to adopt his recommended Order as modified herein.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Blue Grass Provision Co., Inc., Covington, Kentucky, its officers, agents, successors and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 1(a) and (b) and substitute the following:

"(a) Subcontracting out its unit delivery operations without prior notice to or bargaining with the Union.

"(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act."

Footnote continued—

remains is significantly affected by a finding that Respondent unlawfully failed to comply with Sec. 8(d)(3) and (4). Thus, by deleting that portion of the Administrative Law Judge's recommended Order designed to remedy the failure to comply with Sec. 8(d) (by requiring that Respondent continue in full force and effect the terms and conditions of the existing contract for a period of 30 days following the giving of notice of a dispute to the appropriate agency for the Commonwealth of Kentucky), the Union is no longer accorded a minimum time frame during which Respondent is precluded from instituting any unilateral changes in terms and conditions of employment regardless of whether it has bargained to impasse.

5. In his recommended Order and notice the Administrative Law Judge failed to include a provision requiring Respondent to cease and desist from any like or related manner interfering with, restraining, or coercing the employees in the exercise of the rights guaranteed them in Sec. 7 of the Act. Accordingly, we shall modify the recommended order and notice herein to include such a provision.

2. Delete paragraph 2(c) and reletter the following paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 29, 1978

Howard Jenkins, Jr., Member
Betty Southard Murphy, Member
John C. Truesdale, Member

(Seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT subcontract out our unit delivery operations without prior notice to or bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed them by Section 7 of the Act.

WE WILL restore our unit delivery operations.

WE WILL reinstate and make whole the unit employees for any loss of pay suffered by reason of their lay off or discharge, with interest.

Blue Grass Provision Co. Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 3003, 500 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3634.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

Case 9-CA-11074

In the Matter of

BLUE GRASS PROVISION CO., INC.
and
TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 100, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Donald L. Crain, Esq., for the
General Counsel.

Bruce E. Pence, Esq., for the
Charging Party.

William K. Engeman, Esq. and
John E. Campion, Esq., for
the Respondent.

DECISION

Statement of the Case

PHIL W. SAUNDERS, Administrative Judge: Based on a charge filed on February 17, 1977, by the Charging Party, herein the Union or Local 100, a complaint was issued on August 10, 1977, against Blue Grass Provision Co., Inc., herein the Respondent or Company, alleging violations of Sections 8(a)(1), 8(a)(5) and 8(d)(4) of the National Labor Relations Act, as amended. The Respon-

dent filed an answer to the complaint denying it had engaged in the alleged matter. The Respondent and the General Counsel filed briefs.

Upon the entire record in the case, and from my observations of the witnesses and their demeanor,[1] I make the following:

Findings of Fact

I. The Business of the Company

The Respondent is a Kentucky corporation engaged in processing and wholesale distribution of meat products at its Covington, Kentucky facility. During the past 12 months the Respondent sold goods and materials valued in excess of $50,000, and caused them to be shipped directly from its Covington, Kentucky, plant to points outside the State of Kentucky.

At all times material herein, Respondent is, and has been, an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.[2]

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1. The facts found herein are based on the record as a whole upon my observations of the witnesses. *The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic and probability, the demeanor of the witnesses, and the teaching of N.L.R.B. v. Walton Manufacturing Company,* 369 U.S. 404. As to those witnesses testifying in contradiction of the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All testimony has been reviewed and weighed in the light of the entire record.*

2. The record in this case is corrected in accordance with Respondent's Motion to Correct Transcript of Record dated January 26, 1978.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The main issues in this case are:

1. Whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting out all delivery work.

2. Whether the Respondent violated Sections 8(a)(5) and 8(d)(3) and (4) of the Act by failing to continue in full force and effect all terms and conditions of the existing collective-bargaining agreement when notice was not given to the appropriate state agency, pursuant to Section 8(d)(3) of the Act.

For many years the Respondent has been a party to successive collective-bargaining agreements with the Union covering a small unit consisting of the Respondent's truck-driver employees. The most recent collective-bargaining agreement between the Respondent and the Union was effective from February 1, 1974 through January 31, 1977.[3] Also for the past many years the Respondent's production and maintenance employees have been represented in a

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3. The appropriate unit for the purpose of collective bargaining here involved, contains the following employees:

> All truckdrivers, truckdrivers' helpers, mechanics, mechanics' helpers, checkers, forklift truck operators, dockmen, car washers, tire men, gas men and greasers employed by the Employer, directly, indirectly, or in any wholly owned or controlled subsidiary company of the Employer, who are regularly engaged in driving trucks, assisting in the operation of a truck, loading or unloading trucks, checking or routing merchandise or performing such services on similar other vehicles, excluding office clerical employees and all guards, professional employees and supervisors as defined in the Act.

separate unit by Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 7.

This record shows that the five truckdriving employees within the unit here involved deliver the Respondent's meat products to various customers in Northern Kentucky and in the Greater Cincinnati area. Four drivers have completed from 20 to 28 years. Ed Scudder, the remaining driver, was a vacation relief driver and has functioned as such since 1974. Scudder has approximately 10 years of seniority with the Respondent, but was not due to retire for quite some time. Further background evidence reveals that in 1975, the Respondent, without notice to the Union, unilaterally began to use a driver provided by an independent contractor headed by Don Saylor to fill temporary vacancies resulting from its drivers' illnesses and vacations. In fact, Ed Scudder, then on layoff status, filed a grievance over the subcontracting, and the grievance was eventually submitted to binding arbitration and in late 1975, the arbitrator ruled that the Respondent had violated certain sections of the then current collective-bargaining agreement and awarded Scudder backpay and reinstatement to his relief driver position.

On November 12, 1976, the Union notified the Company in writing of its desire to terminate the collective-bargaining agreement as of January 31, 1977, and requested a meeting to negotiate a new agreement. On that same date the Union also sent a Section 8(d)(3) notice to the Federal Mediation and Conciliation Service, one to the Cincinnati Regional Office, and one to the Ohio Industrial Commission. While the Union has its offices in Cincinnati, the situs of the dispute in question is at the Respondent's Covington, Kentucky facility. Therefore, argues, the General Counsel, the 8(d)(3) notice should have been sent to the Kentucky Department of Labor, the appropriate

agency for the State of Kentucky. By the testimony of Mediator Larry Roberts, it was established that such notice was not, in fact, served upon the Kentucky Department of Labor.

Although the bargaining agreement was about to expire, as aforestated, neither of the parties had been in contact with one-another. However, on or about January 14, 1977, Respondent's President William Rice, and the Union's Business Agent, Fred Batsche, who was to negotiate for the Union, talked to one-another over the telephone, and in this conversation Batsche noted that the Respondent has always signed an industry-wide contract with little, if any, changes, and suggested that the contract between them be extended for 30 days so that the parties could better gauge their negotiations based on what the major meat packing firms agreed to. In addition, Business Agent Batsche also requested a 30-day extension of the expiring contract that would provide for retroactivity of the new contract. However, Rice agreed to only an 11 day extension agreement—to February 11, 1977. There was no discussion concerning the subject of subcontracting during this telephone conversation, but the parties did agree to meet later on. As pointed out, Rice did not mention to Batsche that he had already contacted an outside carrier for the purpose of discussing the subcontracting of Respondent's delivery service. This record shows that on or about January 12, 1977, Rice had contacted W. C. Rottenberger of Total Transportation Services, Inc., because Rice was under the impression that Total Transportation was providing delivery service to Kahn's, a large Cincinnati meat packing plant. A few days later, Rice received a letter from Total Transportation Services offering to do a feasibility study, but Rice then rejected this idea because he thought it too expensive.

On or about January 25, 1977, Batsche and Rice met in the Respondent's lunchroom in their first negotiating session and the parties then signed the extension agreement discussed above, and Batsche gave a set of the Union's written proposals to Rice. Rice reviewed the proposals and asked some questions, but generally complained about the overall cost of the package. When Rice finished looking over the proposals, he then asked for additional time to study them. Batsche stated that there was no discussion concerning subcontracting at this negotiating session nor was there any mention by Rice that he had contacted or was negotiating with any outside carrier to perform Respondent's delivery service.[4]

Rice and Batsche met again on January 28, 1977. Rice informed the Union that he did not have a counter offer, but then told Batsche that he wanted to negotiate a contract wherein he could protect his drivers so "that they could retire through attrition," as he was "contemplating getting out of the trucking business." Batsche replied that "at this point" he *could* not do this, and then inquired as to the status of Ed Scudder. Rice told Batsche that Scudder would not be recalled from layoff. Batsche stated that at this meeting he made no offer

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4. Rice testified that at this meeting he mentioned to Batsche that the Company "wanted to get out of the trucking business," and that the Company hoped, because of the seniority of its truck-drivers, to find a way "to phase them out and let them work" until they reached the age of 58 when they could retire. Rice further testified that Batsche then replied that he could not agree with such a proposal because he could not negotiate a contract that would do away with the bargaining unit through attrition, and told Rice that he needed "a three-year contract or nothing," and pointed out that Kahn's a 1000-employee-plus meat packing house, had gone with the 3-year contract with a $1.65 wage increase and a cost-of-living clause, but that if Rice did not like that proposal, Juengling, a small beef slaughtering plant, had accepted a $2 per hour increase with no cost-of-living clause. Rice also stated that on this occasion he further offered to maintain the Respondent's present rate of pay and to pay the increases in the fringe benefits as they became due.

for a 1-year contract, because a contract with such a limited duration would require the abandonment of the pension article since the rules governing the Teamsters pension fund required a 36-month term commitment for coverage. Batsche stated that there was no discussion whatsoever concerning the Respondent immediately subcontracting out all the unit work, and that the meeting ended by Rice telling Batsche that if the Union could not negotiate a contract that would eliminate the unit through attrition, then the Company could not reach a contract with the Union. Batsche then inquired of Rice if he was refusing to further negotiate, and Rice replied that he was. Batsche asked Rice to reconsider his position, but left with the understanding that Rice would not do so.[5]

On January 31, 1977, the Union held a meeting of its unit drivers, and Batsche brought them up-to-date on the contract negotiations, and also explained to them their pension rights and the possibility of losing the unit through attrition. At this meeting the drivers voted to strike after the expiration of the agreement extending the contract.

On February 7, 1977, Rice called the Union because his attorney in Covington, Kentucky, had advised him that he "had damn well better be sure that the Union understood that [the Company] wanted to get out of the trucking business and were going to a common carrier." Rice testified that this is the message "he tried" to convey on the morning of February 7. Batsche stated that the only subcontracting discussed on this occasion concerned the continuation of the deliveries by drivers until they

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5. Rice testified that on January 28, 1977, Batsche came over to his place of business, and merely inquired if the Company had changed their minds—"the way that we were thinking"—and after he replied in the negative, Batsche then stated, "I don't think there is any reason for us to discuss this any further or to talk anymore."

retired, then as they retired, the Company would subcontract. At the conclusion of their phone conversation, Batsche inquired of Rice if he was refusing to negotiate, and Rice answered in the affirmative. However, on the next day, February 8, 1977, Respondent sent a letter to the Union evidencing a clear interest in resuming negotiations. This letter was delivered to the Union's office on February 10, but apparently Batsche did not actually see the letter until sometime later.

At the end of the workday on Friday, February 11, 1977, Rice informed the unit drivers that they were laid off and need not report to work on Monday, and that thereafter the Respondent was going to employ the services of a common carrier to perform their work. On February 14, 1977, an outside firm made deliveries for the Company, and on February 15, 1977, the unit drivers involved herein commenced picketing the Respondent.[6]

It should be noted that sometime subsequent to February 11, 1977, the Respondent admittedly purchased the Ryder equipment it had been leasing prior thereto.

The Respondent argues that they fulfilled their duty to bargain by notifying the Union that it was considering subcontracting, and which notification the Union ignored by refusing to bargain about the decision or its effects, and that once notified, the Union must then request bargaining on the issue for there to be any duty on the employer to actually negotiate. Counsel for the Respondent points out that when Rice notified Batsche that the Company was thinking about subcontracting, no definite

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6. After February 14, the Company approached the Federal Mediation and Conciliation Service to see if they could assist in the controversy. When the FMCS contacted Batsche and requested that he meet with the Company, Batsche referred the Mediation Service to the Union's lawyer. Attorney Pence then told the Mediation Service that the Union would not meet unless the Company "put the unit back as it was."

arrangements had been made at this time with a carrier other than to inquire in the most general way whether a subcontractor might be available to assume the Company's delivery operation, and that the Company had not even inquired into the details of subcontracting. Moreover, that even when final detailed arrangements were made with the outside subcontractor on February 7, 1977, the Company refused to irrevocably commit itself to that course of action, and made it clear to the subcontractor that the whole arrangement could be "washed out" if the Company could reach some agreement with the Union before the subcontractor's service were required. The Respondent further argues that the Company acted lawfully by subcontracting after bargaining to impasse assuming, *arguendo,* that the Union's refusal to discuss the subcontracting and insistence on discussing only its own proposals, can be deemed bargaining on the issue of subcontracting.

The General Counsel maintains that Respondent's violation of Section 8(a)(5) is threefold. First, it committed an unfair labor practice by not bargaining over the decision to immediately and totally subcontract its delivery operation. Second, the failure to bargain over the effects of the subcontracting constitutes a Section 8(a)(5) violation. Third, the Respondent violated Section 8(a)(5) and (d)(4) of the Act by failing to continue "in full force and effect . . . all terms and conditions of the existing contract" without full compliance with the notice and waiting requirements of Section 8(a)(3) and (4) of the Act.

Final Conclusions

It is well established by both the Board and the Courts, that an employer has an obligation to bargain with its employees' bargaining representative concerning

both the decision to subcontract out unit work and the effects of such action on its employees. It has also been duly established that when an employer notifies a union of proposed changes in terms and conditions of employment, it is then incumbent upon the Union to act with "due diligence" in requesting bargaining. However, in the instant case, the evidence shows that the Company gave notice to the Union only of its desire to subcontract out unit work over a period of time as the unit employees retired under the terms of the existing collective-bargaining contract, and there is no credited testimony that the Company ever actually mentioned to the Union that it would immediately and permanently subcontract out all its unit delivery work and discharge its drivers upon termination of the extension agreement on February 11, 1977. At the second negotiating meeting on January 28, 1977, Rice informed Batsche that he wanted to protect his drivers so they could retire through "attrition" as he was "contemplating" getting out of the trucking business. Again, on February 7, 1977, the only subcontracting discussed concerned the retirement of the drivers and that the Company would then subcontract its deliveries. Moreover, there was never any mention by Rice that the unit drivers would be discharged, and, of course, there is a great deal of difference between a gradual termination on the basis of retirement, as compared to their immediate discharge.

It appears to me that if the Company had actually imparted to the Union its desired change for the *immediate* subcontracting of its delivery services upon expiration of the current contract, then some statements detailing this position would have been specifically mentioned, and possibly the Union would have also been informed of the preliminary contacts by the Company with outside truckers. Moreover, it would seem to me an almost im-

possible imposition to require a union to act with "due diligence" in bargaining over a requested change, when, in reality, the proposed change and its immediacy has never been actually communicated to the other party with any definite particularities.

Thus, by unilaterally subcontracting out all of its truckdriving work effective February 14, 1977, thereby eliminating the entire bargaining unit, without giving notice to the Union of such a change, or affording it an opportunity for bargaining over the effects of such changes, the Respondent violated Section 8(a)(1) and (5) of the Act. I am also in agreement that the above conclusion becomes even more inescapable since the parties had not even reached any impasse on the issue of eventual or gradual subcontracting.

In *Mechanical Contractors Association of Newburgh,* 202 NLRB No. 1, the Board, *inter alia,* stated: The term impasse implies that collective bargaining has failed to produce agreement. It cannot be said that a failure to agree at what we view as the primary stage of a bi-level bargaining procedure amounts to impasse. Until the collective-bargaining process has been exhausted, no impasse can occur.

By letter dated February 8, 1977, the Respondent wrote the Union that it wanted to resume negotiations or discussions. Clearly, this is inconsistent with the notion that matters were deadlocked. But, as also pointed out, even if there were an impasse on this matter, *arguendo,* it would not change the result herein. Thus, any bargaining over the proposed gradual subcontracting of unit work over a period of time, cannot be deemed to have satisfied the Respondent's obligation to bargain about the very different proposition of the *immediate* subcontracting of *all* unit work.

In the final analysis, the action of the Respondent resulted in the discharge of the unit drivers who all had many years of service with the Company. The evidence in this record shows that the Union was unaware of Respondent's decision to immediately subcontract and terminate its delivery operations, and, therefore, was in no position to request negotiations.[7]

It is alleged in the complaint that on or about November 12, 1976, the Union gave notice to the Respondent to terminate the collective-bargaining agreement without giving notice to the Commonwealth of Kentucky, Department of Labor, Division of Labor Standards, an agency established to mediate and conciliate disputes within the Commonwealth of Kentucky, as required by Section 8(d)(3) of the Act. In relevant part Section 8(d) states:

> Provided That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written termination or modification sixty days contract of the proposed termination upon the other party prior to the expiration date thereof, or in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;

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7. See *Ozark Trailers, Inc.*, 161 NLRB 561. See also *Stagg Zipper Corp.*, 222 NLRB No. 189; and *P.B. Mutrie Motor Transportation, Inc.*, 226 NLRB No. 199.

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notices of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notices is given or until the expiration date of such contract, whichever occurs later: . . .

The Board, with court approval, has construed the 60-day period specified in Section 8(d)(4) to include a waiting period of 30 days from the date that satisfactory notices are given under Section 8(a)(3).[8]

The Union notified the Company, the Federal Mediation Service, and the Ohio Industrial Commission, on November 12, 1976, of its desire to terminate the contract, as aforestated. On February 11, 1977, the day its contract with the Union expired, the Company notified its unit drivers that they were laid off and need not report to work. The layoff or changes in question therefore occurred more than 60 days after the Union's service upon the Company of an 8(d)(1) notice, and more than the 30 days from the date of notices outlined under 8(d)(3), and had proper notice been given to all parties, there would have been a delay or moratorium on changes

8. The Company argues that 8(d)(4) is inapplicable since the Respondent did not lock out its employees, that the notification provisions of 8(d) are aimed only at reducing the use of economic coercion to secure bargaining advantage, and that 8(d)(4) of the Act requires only that the notice be given by the party that initially seeks termination of the contract.

until February 10, 1977, but thereafter the Company could probably have made lawful changes in the terms of the contract or treated it as expired, as they had fulfilled the waiting requirements of Section 8(d)(3) and (4). However, in the instant case, while the Union complied with Section 8(d)(1) of the Act, it did not fully comply with Section 8(d)(3) since it did not serve the notice on the proper state agency, the Kentucky Department of Labor. While the Union, as the initiating party, had the obligation to provide the Section 8(d)(3) notices, both the Union and Respondent were obligated under Section 8(d)(4) to refrain from striking or locking out, respectively, and to maintain in full force and effect *all the terms and conditions of the existing contract,* until valid Section 8(d)(3) notices were given.[9] Consequently, by discharging the drivers on February 11, 1977, and subcontracting out all the driving work on February 14, 1977, without valid 8(d)(3) notices having been served, the Respondent terminated the contract in violation of Sections 8(d)(4) and 8(a)(5) of the Act. Moreover, as pointed out, since the subcontracting eliminated all bargaining unit work, it was not just a mere breach of contract but, rather, went to the heart of the collective-bargaining relationship and, therefore, constituted a clear unilateral change in its terms and conditions. The subcontracting may be viewed also as a termination of the agreement because the Respondent effectively eliminated the bargaining unit and thereby terminated the bargaining relationship with the Union.

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9. Respondent clearly was not privileged to resort to the change in the terms of the existing contract without regard to the requirements of Section 8(d) merely because of some default on the part of the Union in meeting these requirements. Had the Company desired, it could have ascertained from the Union or from the state agencies involved, whether all the requisite 8(d)(3) notices had been filed and, if not, filed its own notices. See *Peoria Painting & Decorating Contractors,* 204 NLRB 345.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend an order directing it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent's conduct and layoffs constituted a refusal to bargain within the meaning of Sections 8(a)(5) and 8(d) of the Act, I shall recommend that they make whole the employees laid off for loss of earnings suffered by reason of such layoffs, by payments to each employee of a sum of money equal to that which they would normally have earned. The amount of backpay due shall be computed according to the Board's policy set forth in *F. W. Woolworth Co.*, 90 NLRB 289. Payroll and other records in possession of the Respondent are to be made available to the Board, or its agents, to assist in such computation and determining the right to reinstatement. Interest on backpay shall be computed in accordance with *Florida Steel Corporation*. 231 NLRB No. 117 (1977).[10]

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices violative of Sections 8(a)(5) and (1) and 8(d)(4) of the Act.

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10. See also *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

ORDER

Blue Grass Provision Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union concerning the termination or modification of the collective-bargaining agreement by failing to continue in full force and effect all the terms and conditions of the agreement for a period of 30 days from the date a proper notice is given to Federal Mediation Service and to the appropriate state agency of the existence of a dispute within the meaning of Section 8(d)(3) of the Act.

(b) Subcontracting out its unit delivery operations.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Restore its unit delivery operations.

(b) Bargain in good faith with the Union regarding any future subcontracting of unit delivery work.

(c) Continue in full force and effect all terms and conditions of the existing contract for a period of 30 days following the giving of notice of a dispute to the appropriate agency for the State of Kentucky.

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11. In the event no exceptions are filed as provided in Section 102.48 of the Rules and Regulations of the National Labor Relations Board, the findings, Conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Reinstate and make whole all unit employees discharged on February 11, 1977, for any loss of earnings suffered by reason of such terminations in the manner described in "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessay to analyze the amount of backpay due under the terms of this Decision.

(f) Post at its place of business or plant, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 9, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D.C. April 14, 1978

/s/ Phil W. Saunders
Phil W. Saunders
Administrative Judge

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12. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX B

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has rea-

sonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a).

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

No. 80-1544

FILED
MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

BLUE GRASS PROVISION CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner terminated its delivery employees and immediately and permanently subcontracted their work without giving the Union prior notice or an opportunity to bargain about the change and its effects.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1-7) is reported at 636 F. 2d 1127. The decision and order of the National Labor Relations Board (Pet. App. 8-29) are reported at 238 N.L.R.B. 910.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1980. The petition for a writ of certiorari was filed on March 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 30-32.

STATEMENT

1. Petitioner Blue Grass Provision Co., Inc. is engaged in the processing and wholesale distribution of meat products at its Covington, Kentucky facility (Pet. App. 14; A. 45-47).[1] For many years, Blue Grass entered into successive collective bargaining agreements with the Union[2] covering its truckdrivers (Pet. App. 15; A. 34-35). During the 1974-1977 contract, Blue Grass employed five truck drivers, four of whom had from 20 to 28 years of service (Pet. App. 16; A. 36-38). The fifth driver, Scudder, had 10 years of service. Because of a lack of work, he was placed on layoff status and worked as a relief driver when the other drivers were absent or on vacation (Pet. App. 16; A. 37).

In 1975, without notice to the Union, petitioner began using an independent contractor to perform Scudder's relief driver work. In late 1975, in response to a grievance filed by Scudder, an arbitrator determined that Blue Grass had violated the contract by assigning Scudder's duties to non-unit personnel, and ordered appropriate relief (Pet. App. 16; A. 24, 42).

In November 1976, the Union notified petitioner of its desire to terminate the 1974-1977 contract, scheduled to expire on January 31, 1977, and requested a meeting to negotiate a new agreement (Pet. App. 16; A. 28). Thereafter, in a telephone conversation with Company President William Rice on or about January 14, Union Business Agent Fred Batsche requested that negotiations be delayed and the current contract extended for 30 days until industry-wide negotiations were completed; Batsche noted that in the past petitioner had agreed to a contract that was

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[1] "A." refers to the appendix in the court of appeals.

[2] Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

similar to that worked out with the major meat packing firms in the area (Pet. App. 17; A. 78, 79). Rice agreed only to extend the contract 11 days—to February 11, 1977 (Pet. App. 17; A. 27, 29, 79). Contemporaneously, Rice began contacting outside carriers to inquire about subcontracting the drivers' work (Pet. App. 17; A. 32-33, 40-41, 53-54). Prior to his first meeting with the Union, Rice determined that one carrier's proposal was too expensive (Pet. App. 17; A. 32-33, 53-54), and that a second carrier was interested in taking over petitioner's delivery work (A. 55-56, 40).

On January 25, Rice and Batsche held their first negotiating session (Pet. App. 18; A. 27, 80). Batsche gave Rice a set of the Union's written contract proposals, incuding one that would have banned subcontracting (Pet. App. 18; A. 26, 80). Rice reviewed the proposals, asked several questions, complained about the overall cost of the package, and asked for additional time to study the proposals (Pet. App. 18; A. 80-82). Rice and Batsche did not discuss subcontracting at this negotiating session, nor did Rice mention that he had contacted or was negotiating with an outside carrier to make petitioner's deliveries (Pet. App. 22, 18; A. 81-82, 99-100).

On January 28, President Rice and Business Agent Batsche met again to discuss the contract (Pet. App. 18; A. 82). Rice informed Batsche that he wanted to negotiate a contract that would protect the Company's drivers so "that they could retire through attrition" as he was "contemplating getting out of the trucking business" (Pet. App. 18; A. 83). Batsche replied that "at this point" he could not agree to this proposal (*ibid.*), and inquired specifically whether Rice proposed to recall the relief driver, Scudder, to full time status when one of the regular drivers retired. After Rice stated emphatically that he would not recall Scudder from layoff, Batsche said that he could not accept a contract under which bargaining rights would be lost through attrition (Pet. App. 18; A. 83-84, 101). The meeting ended when

Rice told Batsche that, if the Union would not agree to eliminate the unit through attrition, petitioner could not reach a contract. Batsche asked if Rice was refusing to negotiate further; Rice replied that he was. Batsche then asked Rice to reconsider, but left the meeting with the understanding that Rice would not change his position (Pet. App. 19; A. 70, 85-86).

On January 31, Batsche met with the drivers and informed them of petitioner's proposal to eliminate their jobs through attrition. Batsche also advised the relief driver, Scudder, that the Company did not plan to recall him from layoff but intended instead to have a subcontractor do his work. The drivers then voted to strike at the February 11 expiration of the extension agreement (Pet. App. 19; A. 86-87).

On February 7, President Rice, upon the advice of his attorney, called Business Agent Batsche to make sure that he understood petitioner's position (Pet. App. 19; A. 65). On this occasion, as on January 28, the only subcontracting proposal advanced by Rice to the Union called for the full-time drivers to continue working until they retired, and for a subcontractor to take over the unit work as it became available through attrition (Pet. App. 22, 18-19; A. 87-88, 55-56). At the end of the telephone call, Batsche asked Rice if he was refusing to negotiate further, and Rice confirmed that he was (Pet. App. 19; A. 43, 65-66). Following this conversation, however, Rice concluded that he had "laid an egg in saying that I did not wish to negotiate" (A. 66). The next day, February 8, Rice sent Batsche a letter indicating that petitioner was interested in further negotiations and hoped Batsche would "offer some alternatives to our plight" (Pet. App. 20; A. 25, 42-43, 67). This letter was delivered to the Union's office on February 10, but was not seen by Batsche until some time later (Pet. App. 20; A. 88-89).

Following his February 7 conversation with Batsche, Rice made arrangements for a subcontractor to supply drivers for petitioner's trucks on February 14 if an agreement were not worked out with the Union by the time the contract expired on February 11 (A. 67-69). At the close of business on February 11, Rice informed the four full time drivers that "they were through" (Pet. App. 20; A. 38, 43); the Union learned of the discharges from the employees (A. 89-90). On Monday, February 14, a subcontractor, Kent Express, began making deliveries in petitioner's trucks (Pet. App. 20; A. 38-39, 69-70).[3]

At no time during the negotiations with the Union did petitioner ever propose terminating its drivers immediately and permanently subcontracting their work; its only proposal had been to subcontract each driver's work as he retired (Pet. App. 22, 18-20; A. 87-90). On the evening of February 14, following their discharge and replacement by the subcontractor, the employees met with their union representatives. On the following day, they began picketing Blue Gress (Pet. App. 20; A. 97-98, 102-103). Thereafter, the Union refused to pursue further negotiations until petitioner "put the unit back as it was" (Pet. App. 20 n.6; A. 105).

2. On the foregoing facts, the administrative law judge rejected petitioner's contention that it gave proper notice that it was considering subcontracting the drivers' work and bargained to impasse with the Union before implementing its proposals (Pet. App. 20-21). The administrative law judge found that petitioner gave notice "only of its desire to subcontract out unit work over a period of time as the unit

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[3]Prior to the termination of the drivers and the subcontracting of their work, petitioner owned two trucks and leased three others; sometime after February 11, petitioner purchased the three trucks it had previously leased (Pet. App. 20; A. 43-44, 68-70).

employees retired" and never notified the Union "that it would immediately and permanently subcontract out all its unit delivery work and discharge its drivers upon the termination of the extension agreement on February 11, 1977" (Pet. App. 22). Noting petitioner's letter of February 8 inviting further negotiations, the administrative law judge found that the parties "had not even reached any impasse on the issue of eventual or gradual subcontracting" (Pet. App. 23). He further found that, even assuming the negotiations were at impasse on this issue, "it would not change the result" since "any bargaining over the proposed gradual subcontracting of unit work over a period of time, cannot be deemed to have satisfied [petitioner's] obligation to bargain about the very different proposition of the *immediate* subcontracting of *all* unit work" (*ibid.*). Accordingly, the administrative law judge concluded, *inter alia*, that petitioner violated Section 8 (a)(5) and (1) of the National Labor Relations Act by unilaterally subcontracting out all its truckdriving work, thereby eliminating the entire bargaining unit, without giving the Union notice and an opportunity to bargain about the change (*ibid.*).

The Board affirmed the administrative law judge's rulings, findings and conclusions, and ordered petitioner, *inter alia*, to cease subcontracting its delivery operations "without prior notice to or bargaining with the Union" (Pet. App. 10), to restore its delivery operations, to reinstate and make whole for lost pay all unit employees discharged on February 11, and to bargain in good faith with the Union regarding any future subcontracting of unit delivery work (Pet. App. 10-11, 28-29).[4]

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[4]The Board found, contrary to the administrative law judge (Pet. App. 24-26), that it was unnecessary to decide whether petitioner had terminated the contract without complying with the 30-day mediation and 60-day bargaining requirement set forth in Section 8(d)(3) and (4) of the Act since the scope of the remedy for this alleged violation is

3. On review, the court of appeals concluded that the Board's findings were supported by substantial evidence and, accordingly, enforced the Board's order (Pet. App. 1-7). In rejecting petitoner's contention that it had given adequate notice of its intentions and had bargained to impasse over its subcontracting proposal, the court observed that, while the term "impasse" is not subject to precise definition, at a minimum "it encompasses the notion that both sides are aware of precisely what is at issue and that they have made more than a perfunctory attempt to reach a resolution" (Pet. App. 5). The court's examination of the record failed to uncover any evidence that petitioner ever unequivocally informed the Union of an intention "to subcontract work on a definite date" (*ibid.*) and revealed instead that there was "considerable doubt whether the Union ever understood [that petitioner] meant to terminate the bargaining unit upon expiration of the contract * * *" (Pet. App. 6). The meetings between the parties were, said the court, "at best preliminary sparring matches," a conclusion reinforced by petitioner's "own letter of February 8 evidencing its willingness to talk further with the [U]nion" (*ibid.*).[5]

ARGUMENT

1. The first question presented in the petition (Pet. I)—whether an employer's decision to terminate a portion of its operations for economic reasons is a mandatory subject of

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essentially identical to the remedy imposed for the Section 8(a)(5) violation found by the Board (Pet. App. 9-10 n.4). Member Murphy would have found petitioner liable for the additional violation (*ibid.*).

[5]Similarly, the court rejected petitioner's contention that its subcontracting of bargaining unit work was equivalent to a lockout in support of its bargaining demands (see Pet. App. 6-7, distinguishing *Lane* v. *NLRB*, 418 F. 2d 1208 (D.C. Cir. 1969)), and found further that petitioner had failed to advance legitimate and substantial business justifications comparable to those advanced by the employer in *Lane* (Pet. App. 6-7).

bargaining under Section 8(a)(5) of the Act—is not properly raised here. In the proceedings before the Board, petitioner did not dispute that it was obliged to bargain with the Union before contracting out its delivery operations and terminating its drivers; instead petitioner contended that it had satisfied its obligation by giving the Union notice and an opportunity to bargain about the proposal (Pet. App. 20-21). Accordingly, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes petitioner from challenging in this Court its obligation to bargain. *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-256 (1943). Moreover, petitioner did not question its duty to bargain before the court of appeals (Pet. App. 4), and where issues are neither raised before nor decided by a court of appeals, this Court ordinarily will not consider them. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's decision to utilize the employees of a subcontractor to drive its delivery trucks is the kind of proposed activity held to be a mandatory subject of bargaining in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964). The vitality of *Fibreboard's* holding is not questioned in *First National Maintenance Corp.* v. *NLRB*, No. 80-544 (argued Apr. 21, 1981), which involves not the replacement of employees by a subcontractor, but the decision to terminate a portion of an operation.

2. The second question presented in the petition (Pet. I)—whether an employer who bargains with a union about subcontracting unit work must reach impasse with the union before implementing the decision—is also not properly raised here. This question, like the first, was not raised before either the Board or the court of appeals; below, petitioner argued simply that it had in fact bargained to impasse (Pet. App. 5, 20-21).

Furthermore, although the Board has expressed its respectful disagreement with the Fifth Circuit on the question whether an employer ordinarily must bargain to impasse with a union before implementing proposals (compare *Winn-Dixie Stores, Inc.* v. *NLRB*, 567 F. 2d 1343 (1978), with *Winn-Dixie Stores, Inc.*, 243 N.L.R.B. No. 151 (Aug. 2, 1979)), the issues dividing the Board and the Fifth Circuit are not presented here. Thus, whatever the extent of an employer's obligation to bargain, it is uncontroverted that *at a minimum* an employer normally must give a union notice of its proposal and a reasonable opportunity to bargain about it.[6] Even in the Fifth Circuit, an employer who implements changes substantially different from those it discussed with the union fails to meet this minimum requirement and accordingly violates Section 8(a)(5) and (1). *Winn-Dixie Stores, Inc.* v. *NLRB, supra*, 567 F. 2d at 1349-1350.

Here, the administrative law judge found that petitioner, by discharging its senior drivers and permanently subcontracting their work, implemented a change substantially different from its proposal to subcontract its delivery work as each driver retired, and that petitioner never gave the Union notice and an opportunity to bargain about this change prior to its implementation (Pet. App. 21-24). The only question for review, therefore, is whether this finding is supported by substantial evidence. Such an evidentiary determination, sustained by both the Board and the court of appeals, does not warrant further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as shown in the Statement, the Board's findings are amply supported by the record and its legal conclusions are in

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[6]See, *e.g.*, *NLRB* v. *Crystal Springs Shirt Corp.*, 637 F. 2d 399, 402-403 (5th Cir. 1981); *NLRB* v. *J.P. Stevens & Co.*, 538 F. 2d 1152, 1162-1164 (5th Cir. 1976); *Firch Baking Co.* v. *NLRB*, 479 F. 2d 732, 735-736 (2d Cir.), cert. denied, 414 U.S. 1032 (1973).

accord with settled authority. *NLRB* v. *Katz*, 369 U.S. 736 (1962); *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
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MAY 1981

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[7]Contrary to petitioner's suggestion (Pet. 7, 10-11), this case does not present the issue whether an employer may, without bargaining, lock out its employees for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position. Petitioner discharged its drivers at the expiration of the contract (Pet. App. 24, 22, 20; A. 38-43); it did not lock them out contingent on their accepting petitioner's proposals to subcontract unit work as each driver retired.

DOJ-1981-05